No. 87-726

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

DELAWARE COUNTY PRISON BOARD OF INSPECTORS,

Petitioner,

vs.

JALEE HYNSON, a minor, by and through her Grandparent and Guardian, JEFFRIE HYNSON, and CHARZEL HYNSON, a Minor, by and through his Grandparent and Guardian, JEFFRIE HYNSON, and JEFFRIE HYNSON, Administratrix of the Estate of ALESIA HYNSON, and JEFFRIE HYNSON, in her own right.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Has the case of *Owen v. City of Independence,* 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), which clearly holds that a municipality enjoys no immunity whatsoever in Section 1983 actions, been tacitly or impliedly overruled by subsequent United States Supreme Court cases dealing with the qualified immunity of public officials?

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TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
Summary of Argument	3
Reasons for Denying the Writ	3
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, ____ U.S. ____, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) 4, 7

Dennis v. Sparks, 449 U.S. 24, 101 S. Ct. 183, 96 L. Ed. 2d 185 ..... 4, 6, 7

Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) 4, 6, 7, 8

Hynson v. City of Chester, 827 F.2d 932 (3 Cir. 1987) 2

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Contents

Page

Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 4

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) 5

Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) .....i, 3, 4, 5, 6, 8

Statute Cited:

42 U.S.C. § 1983.....i, 4, 5,

Rule Cited:

United States Supreme Court Rule 17.1(a)(b)(c) 3

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STATEMENT OF THE CASE

Respondents call attention to certain inaccuracies in the

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petitioner's Statement of the Case which require correction or clarification as follows:

(a) In footnote 1 on page 2 of the Petition, petitioners state that, "the restraining order in fact had not been presented to and signed by the Judge until October 16, 1984". On October 11, 1984, Alesia Hynson appeared in court for the final hearing on a Protection from Abuse Petition against Gandy. The judge verbally granted the relief sought on the record. The actual typed order was not presented to the judge for signature by Alesia Hynson's attorney until October 16, 1984.

(b) On page 3, paragraph 1 of the Petition, petitioner states that respondents conceded that "no authority existed investing petitioner and its officers with the duty or power to apprehend Gandy". To the contrary, respondents have never conceded that petitioner had no duty or power to apprehend Gandy immediately upon his failure to report. Respondents have conceded that they could find no duty to apprehend on the part of the public official, Prison Warden Kenneth Matty. *Hynson v. City of Chester,* 827 F.2d 932 (3 Cir. 1987) (Appendix, A6).

(c) Respondents cannot agree with the statements on page 2, paragraph 5 and page 3, paragraph 1 of the Petition, which indicate that when Gandy failed to report, "the prison officials on duty prepared an incident report that night, pursuant to the prison's 'no show' policy", and that "the sentencing judge was to be informed of Gandy's failure to report" and "requested to issue a bench warrant for Gandy's arrest". No discovery has yet taken place concerning the October 14, 1984 activities of the prison officials, which would serve to inform respondents thereof, and enable respondents to admit or dispute these facts.

(d) Petitioner is clearly mistaken in stating on page 3, paragraph 5 of the Petition that respondents "asserted for the

first time that the qualified immunity defense was not available to petitioner" during the course of oral argument before the Court of Appeals. Logically, respondents' Answer to Petitioner's Motion for Summary Judgment in the District Court argues against qualified immunity for petitioner, and respondents have maintained that position to this date.

SUMMARY OF ARGUMENT

A petition for writ of certiorari should not be granted in this case because the decision of the Court of Appeals of the Third Circuit does not conflict with any decisions of the United States Supreme Court, any federal district courts or courts of appeals, or any state courts of last resort. Rule 17.1(a), (b), and (c) of the Rules of the Supreme Court of the United States. The Third Circuit properly applied the law of *Owen v. City of Independence,* 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), to the facts of this case, with the result that petitioner must participate in a civil rights trial. Petitioner attempts to generate confusion and impose conflict where none exists, in the hope of convincing this Honorable Court to grant certiorari and interminably delay petitioner's participation in trial.

REASONS FOR DENYING THE WRIT

A petition for writ of certiorari should not be granted in this case because this Honorable Court has already addressed and ruled on the issue to be decided, and petitioner points to no conflicting decisions of any court.

Respondents instituted this lawsuit against several defendants, including a public official (Warden Kenneth Matty), and a municipal corporation (the Delaware County Prison Board of Inspectors), petitioner herein. Qualified immunity was sought for both the public official and the municipal corporation. For reasons

set forth in the minutest detail in the decisions of this Court, these two categories of defendants have been consistently treated separately and differently with reference to their entitlement to qualified immunity in civil rights cases.

The qualified immunity of public officials was addressed and recognized in several cases, taking into consideration the nature of the official's duties and his conduct in the circumstances of each particular case. *See, e.g., Dennis v. Sparks,* 449 U.S. 24, 101 S. Ct. 183, 96 L. Ed. 2d 185 (1980) (immunity of judges for actions performed in their judicial capacity); *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) (immunity of presidential aides); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (immunity of United States Attorney General concerning national security functions); *Anderson v. Creighton,* ____ U.S. ____, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (immunity of FBI agent for Fourth Amendment violation). Qualified immunity for a municipality, however, has been addressed, but has never been recognized.

In 1980, this Court decided *Owen, supra,* which involved a § 1983 claim against the City of Independence and several city officials. This Court held that there was no derivative, subjective, good faith, qualified immunity for the municipality based upon the good faith of the officials. This Court then went through an exhaustive analysis of the historical background and various policy considerations for the immunity doctrine in search of any other bases which would support municipal immunity. None was found. The *Owen* opinion could not be clearer in its denial of immunity to a municipality under § 1983 regardless of the circumstances. To date, *Owen* has not been overruled, qualified or clarified by this Court. Petitioner has pointed to no cases which evince confusion on the part of the courts, misapply *Owen,* or a conflict between *Owen* and any other judicial opinions.

Petitioner attempts to obfuscate the clarity of the *Owen* holding by interpreting *Owen* to deny only vicarious or derivative immunity to a municipality. Petitioner then argues that it seeks not derivative immunity, but immunity as "a person itself". What petitioner overlooks is that the *Owen* Court examined not just derivative immunity, but all avenues which may have led to the immunity of a municipality. The Court rejected them all. There is simply no immunity for a municipality under § 1983, only for human beings. While a municipality may have been held to be a "person" to facilitate the legislative intent that § 1983 apply to municipalities also, *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), it has never been held that a municipality is actually "a person itself" to be equated with human beings and to be favored with the identical policy considerations or other mitigating factors that human beings may deserve.

Petitioner argues that the Court of Appeals' holding unduly "extends" *Owen* and "extinguish[es] the distinct defense actually asserted by petitioner: a municipal person's own right to quick termination of insubstantial lawsuits by asserting objective immunity early in the litigation to dismiss the § 1983 claim because its policy did not violate clearly established constitutional rights". (Petition, p. 5, ¶ 3). Respondents submit that *Owen cannot* be extended — the case already holds that there is no immunity for a "municipal person" under any circumstances. Further, *Owen* does not extinguish any defense, or compromise any right, enjoyed by municipal corporations. The defense or right referred to by petitioner simply does not exist in the first place. The Court of Appeals plainly and clearly applied the law of *Owen* to the instant case. Petitioner's dissatisfaction with the outcome cannot be a basis for granting a writ of certiorari.

In further support of the argument that qualified immunity should be logically accorded to municipal corporations in the same

manner as it is to public officials, petitioner argues that the qualified immunity granted Warden Kenneth Matty by the Court of Appeals, and unchallenged by respondents herein, would be useless if Matty then must participate in the trial as a witness for petitioner. Petitioner argues that to grant immunity to the public official and not to the municipal corporation would frustrate the purposes of the doctrine of qualified immunity, in that the official's participation in the trial would interfere with the performance of his duties and the effective operation of government. Respondents are aware that considerations such as these and others are what led this Court to adopt an objective test for the qualified immunity of public officials, to be applied prior to trial for the purpose of preventing a public official from defending the trial of insubstantial claims against him. *Harlow, supra.* These same considerations were also examined by this Court in *Owen, supra,* 445 U.S. at 652-656, with reference to the immunity of a municipality, and were found to be much less compelling.

In *Dennis, supra,* this Court addressed the petitioner's argument. Dennis granted immunity to a judge for bribery and conspiracy, while denying immunity to his co-conspirators. Concern was expressed that the judge's immunity was worthless if he must still participate in the trial as a witness. The reasoning of this Court, set forth below, clearly applies to petitioner's concerns for Warden Matty in the instant case:

> Of course, testifying takes time and energy that otherwise might be devoted to judicial duties[.]
>
> * * *
>
> [T]he concern that his conduct will be examined in a collateral proceeding . . ., a proceeding in which he cannot be held liable for damages and

> which he need not defend, is not of the same order of magnitude as the prospect of being a Defendant in a damages action from complaint to verdict with the attendant possibility of being held liable for damages.

Dennis, supra, 449 U.S. at 30-31, 101 S. Ct. at 188. The *Dennis Court* reasoned that the public harm potentially resulting from the judge having to testify, was outweighed by the need to provide a remedy to the party whose constitutional rights had been violated. Kenneth Matty is immune and need not defend this lawsuit. The fact that he may have to testify on one or two occasions does not constitute a compelling reason for this Court to also award immunity to the petitioner.

Petitioner further quotes the case of *Anderson, supra,* quoting out of context as follows: "*Harlow* clearly expressed the understanding that the general principal of qualified immunity it established would be applied 'across the board'." (Petition, p. 8, ¶ 1). This would appear to mean that the Court meant qualified immunity to be applied to municipalities as well as public officials. This is not the case. A reading of the *Anderson* case makes clear that by "across the board", this Court meant that qualified immunity applies to conduct of public officials resulting in constitutional violations of all types. (The plaintiffs in *Anderson* had asserted that qualified immunity does not apply when the conduct results in a violation of the Fourth Amendment right to be free from unreasonable search and seizure.) The *Anderson* case does not address in any manner whatsoever the application of qualified immunity to a municipality or municipal corporation.

Petitioner's further argument that this Court should grant certiorari because it has been determined that the petitioner's "no show" policy does not violate any clearly established constitutional rights, is also with merit. The Court of Appeals, in applying the

objective test for qualified immunity of *Harlow, supra,* with reference to Warden Matty, stated that while a duty to apprehend Gandy may have existed, "it can in no way be said to have been clearly established at the time of the alleged violation". This is irrelevant with respect to petitioner and the issue of the immunity of municipal corporations. Petitioner is not entitled to have the test for qualified immunity applied to it based upon *Owen, supra.* The issue of whether the petitioner's policy was unconstitutional, making petitioner liable to the plaintiff, must first be determined after trial in the District Court, not by the Court of Appeals in the course of applying a test for qualified immunity for a public official.

Ironically, the Court of Appeals in *Owen* seemed to apply the objective test of *Harlow*, which then did not exist, when it stated, "We hold the City not liable for actions it could not *reasonably* have known violated [the plaintiff's] constitutional rights". (emphasis supplied). The Supreme Court apparently chose not to apply an objective test or place any value on what a reasonable city would have done. The Court weighed the interests of the city and the victim and held no immunity applied, objective or otherwise.

Finally, petitioner has cited no case which in any way addresses the qualified immunity of a municipality or municipal corporation, and has made no argument not already examined by this Court in favor of overruling the clear and firm holding of *Owen, supra.*

CONCLUSION

For the above reasons, respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Dated: November 30, 1987

Respectfully submitted.

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